Filed 11/10/20 In re J.F. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re J.F., a Person Coming Under the Juvenile Court Law.	B304501 (Los Angeles County Super. Ct. No. 19CCJP08291A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.F., Defendant and Appellant.	

APPEAL from findings and an order of the Superior Court of Los Angeles County, Craig S. Barnes, Judge. Affirmed.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kim Nemoy, Acting Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant S.F. (father) appeals from the juvenile court's jurisdictional findings regarding his daughter J.F. (minor, born 2018) and dispositional order removing her from his custody. He contends that the court applied an incorrect standard of proof when sustaining the dependency petition and that substantial evidence did not support the finding of jurisdiction or removal order. We affirm.

FACTUAL BACKGROUND

Minor, father, minor's mother (mother),[1] and mother's two other daughters[2] shared a home with father's adult cousin (paternal cousin) and paternal cousin's three children, including her 14-year-old daughter, A.S.

Around midnight on December 6, 2019, paternal cousin woke up and noticed that A.S. was not in bed. Paternal cousin observed that a light was on in her son's room even though he was supposed to be at work. She tried to open the door, but it was locked. She knocked and, about three minutes later, A.S. opened the door. Once inside the room, paternal cousin saw that

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[1] Mother is not a party to this appeal.

[2] Father is not the father of mother's other children, and they were not subjects of the dependency petition.

the bed was not made. She opened the closet door and saw father holding on to his pants with one hand. Father tried to close the closet door to prevent paternal cousin from seeing him. He then pushed past paternal cousin and fled.

A.S. was brought to a police station and then taken to a hospital for a forensic sexual assault examination. Suction injuries were observed on her breasts. She stated that she had "initiated the sexual activity" with father. Father, then 34 years old, was arrested on suspicion of unlawful sex with a minor.

A few days later, A.S. told a social worker that she had sexual intercourse with father before being discovered by paternal cousin. She denied being forced by father. In the preceding month, she had sex with father three or four times.

When interviewed in December 2019, mother stated that she had been unaware of father's behavior toward A.S. prior to his arrest. A year earlier, however, she had confronted father, paternal cousin, and A.S. about a text she saw on father's phone from A.S. that read, in Spanish, "'are you mad, love?'" Each had denied that the text was sent or received. When interviewed again in January 2020, mother stated that she no longer wanted to have a relationship with father. She wanted to move to Utah, where her sister lived, and start over.

PROCEDURAL BACKGROUND

Dependency Petition and Detention Hearing

On December 31, 2019, the Los Angeles County Department of Children and Family Services (DCFS) filed a dependency petition seeking the juvenile court's exercise of jurisdiction over minor. Brought pursuant to Welfare and Institutions Code section 300, subdivisions (b)(1) (failure to

protect) and (d) (sexual abuse),[3] the petition alleged that father had sexually abused A.S.—a member of minor's household—on December 6, 2019, and on prior occasions. Father's sexual abuse of A.S. endangered minor's physical health and safety and placed her at risk of serious physical harm and sexual abuse.

At the detention hearing on January 2, 2020, the juvenile court found that a prima facie showing had been made that minor was a person described by section 300. Minor was removed from father and released to mother's home under DCFS supervision.

Adjudication and Termination of Jurisdiction

The adjudication hearing took place on January 30, 2020. While mother submitted to the juvenile court's jurisdiction, father sought to have the dependency petition dismissed in its entirety. Father's counsel argued that father's alleged acts "show[ed] a lack of judgment and control" but not a risk to minor. Counsel pointed to the lack of evidence "that [f]ather ever abused, neglected, or inappropriately touched his own child, much less any other female minors in the home" or "expert testimony . . . to establish that [he] is likely to abuse his one-year-old daughter because of a consensual sexual relationship with a 14-year-old girl[.]"

The juvenile court expressed its belief that father's sexual relationship with A.S. could not be consensual given her age. The evidence "suggest[ed] that [f]ather was consciously engaged in a surreptitious plan" with A.S., a "blood relative." The court described it as "an elaborate plan to figure out where to have sex, when to have sex, how [d]o you keep it from others." Father's conduct was "abhorrent"—"not just the act, but the way it was

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[3] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

perpetrated." "[H]e had turned [A.S.] into a confederate." That father "had the temerity to" abuse A.S. "just below the radar" of his family "heighten[ed] the sense of risk to" minor.

The juvenile court sustained the dependency petition as pled, commenting that it was "supported by substantial evidence of a risk that would exist at the present time to" minor. Minor was declared a dependent of the court, removed from father, and released to mother.

Finding that the conditions justifying the initial assumption of jurisdiction no longer existed and were not likely to exist if supervision was withdrawn, the juvenile court then terminated its jurisdiction. The order terminating jurisdiction was stayed pending receipt of a juvenile custody order providing sole legal and physical custody of minor to mother and monitored visitation for father after his release from custody. The juvenile custody order was received the next day, on January 31, 2020, and the stay was lifted.

This timely appeal ensued.

DISCUSSION

I. The Juvenile Court Did Not Apply an Incorrect Standard of Proof in Sustaining the Dependency Petition.

When the juvenile court sustained the dependency petition, it stated: "I think the petition is supported by substantial evidence of a risk that would exist at the present time to this young child." According to father, this statement demonstrates that the court incorrectly applied the substantial evidence standard of appellate review instead of the proper preponderance of the evidence standard of proof.

Because it has been long settled that the standard of proof applicable to jurisdictional findings in juvenile dependency cases

is preponderance of the evidence (§ 355, subd. (a); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248), the juvenile court had no obligation to articulate the standard upon which it made its findings and we may presume that it used the correct one. (*In re Fred J.* (1979) 89 Cal.App.3d 168, 175 ["where a new standard of proof recently has been announced, or where the issue of the applicable standard is unclear, articulation is required[,]" but "where the issue is well settled, it is presumed that the trial judge applied the appropriate standard and no articulation is required"].)

Father argues that this presumption does not apply here because the juvenile court articulated an incorrect standard of proof. We disagree. It is more reasonable to view the court's statement that the petition was "supported by substantial evidence" as a qualitative description of the evidence—that is, the evidence was ample or considerable (see Merriam-Webster's Collegiate Dict. (11th ed. 2020) p. 1245, col. 2 [defining substantial as "ample to satisfy[,]" "considerable in quantity[,]" and "significantly great"])—rather than the legal standard it was employing to assess that evidence. Father has thus failed to affirmatively show error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Even if we were to assume that the juvenile court erroneously applied the substantial evidence standard of review when making its jurisdictional findings, we would not reverse for two independent reasons.

First, father forfeited his challenge on appeal by failing to object to or request any clarification of the standard of proof. (See *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411–412 (*Riva M.*).)

Second, any error was harmless. "Because the issue is not one of constitutional dimension, the question is whether there is a reasonable probability the outcome would have differed in the absence of the procedural irregularity." (*Riva M.*, *supra*, 235 Cal.App.3d at pp. 412–413.) We conclude that it would not.

Contrary to father's characterization, this was not a close case regarding the propriety of exercising dependency jurisdiction; the fact that the juvenile court asked questions of counsel during oral argument does not demonstrate otherwise. As discussed more fully in the following sections, father repeatedly sexually abused a child who was a biological relative, lived in the same home as minor, and was the same gender as minor. Not only do we find below that this was sufficient evidentiary support from which the court could make the jurisdictional findings by a preponderance of the evidence, but we also conclude that it constituted substantial evidence from which a reasonable trier of fact could find it highly probable that father's continued custody of minor placed her at risk of substantial danger. (See § 361, subd. (c) [juvenile court applies clear and convincing standard of proof to removal order]; *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 997 (*O.B.*) ["When reviewing a finding made pursuant to the clear and convincing standard of proof, an appellate court must attune its review for substantial evidence to the heightened degree of certainty required by this standard"]; *In re V.L.* (2020) 54 Cal.App.5th 147, 155 ["*O.B.* is controlling in dependency cases"].) There is no reasonable probability that the court would have dismissed the dependency petition if not for error.

II. Substantial Evidence Supported the Finding of Dependency Jurisdiction.

Father contends that the evidence was insufficient to support the juvenile court's jurisdictional findings under section 300, subdivisions (b)(1) and (d).[4]

A. Relevant law

Under section 300, subdivision (b)(1), the juvenile court has jurisdiction over and may adjudge to be a dependent of the court a "child [who] has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . ." Jurisdiction also extends, under section 300, subdivision (d), to a "child [who] has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in [s]ection 11165.1 of the Penal Code, by his or her parent . . . ."

"[S]ection 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a 'substantial risk' that the child will be abused or neglected. . . . [Citation.] 'The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps

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[4] As a threshold matter, we agree with father that his appeal remains justiciable even though the juvenile court has terminated its jurisdiction. (See *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 ["The fact that the dependency action has been dismissed should not preclude review of a significant basis for the assertion of jurisdiction where exercise of that jurisdiction has resulted in orders which continue to adversely affect appellant"].) DCFS does not argue otherwise.

necessary to protect the child.'" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

The existence of a substantial risk is a function of the likelihood of a particular harm and the magnitude of that harm. Thus, "'[s]ome risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great. . . . Conversely, a relatively high probability that a very minor harm will occur probably does not involve a "substantial" risk. . . .'" (*In re I.J.*, *supra*, 56 Cal.4th at p. 778.)

B. Standard of review

We review the juvenile court's jurisdictional findings for substantial evidence—"evidence that is reasonable, credible and of solid value. [Citations.] We do not evaluate the credibility of witnesses, attempt to resolve conflicts in the evidence or determine the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

"'When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.'" (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

C. Analysis

Father does not challenge the juvenile court's finding that he sexually abused A.S. on multiple occasions. Instead, he argues that there was no substantial evidence to support the finding that minor was at substantial risk of serious physical harm based on father's inability to protect her (§ 300, subd. (b)(1)) or that minor was at substantial risk of sexual abuse based on father's sexual abuse of A.S. (§ 300, subd. (d)).

As to the jurisdictional finding under section 300, subdivision (d), specifically, we cannot agree. Father repeatedly sexually abused A.S.—a child who was his biological relative, resided in the same home as minor, and was the same gender as minor. While A.S. reported having sex with father three or four times in late 2019, evidence—specifically the text message from A.S. found by mother on father's phone a year earlier asking "'are you mad, love?'"—indicates that father had engaged in an inappropriate relationship with her for much longer. That the sexual abuse was committed in the family home, under the radar of numerous family members, points to a calculated effort by father to conceal his conduct. As the juvenile court described it, father's abuse of A.S. involved "an elaborate plan" in which he aimed to turn his victim—a child—"into a confederate."

"[S]exual or other serious physical abuse of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations." (*In re Kieshia E.* (1993) 6 Cal.4th 68, 76–77.) We conclude that the evidence that father committed such "a fundamental betrayal" (*id.* at p. 76) through his sexual abuse of A.S. constituted substantial evidence that minor was also at substantial risk of sexual abuse by him. (See *Los Angeles County Dept. of Children & Family Services v.*

Superior Court (2013) 215 Cal.App.4th 962, 968 (*Los Angeles County*) [recognizing the weight of authority "that sexual abuse of one child may constitute substantial evidence of a risk to another child in the household"].) Even if the probability of such abuse was low, the magnitude of the potential harm if the risk materialized was great. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ["The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people"].) Under such circumstances, the juvenile court could reasonably conclude that the risk of sexual abuse to minor was substantial. (See *In re I.J.*, *supra*, 56 Cal.4th at p. 778; *In re S.R.* (2020) 48 Cal.App.5th 204, 207 [""even . . . a low degree of probability"' can give rise to a substantial risk if "'the magnitude of the harm is potentially great[]"""].)

In arguing that substantial evidence was lacking to support the jurisdictional finding under section 300, subdivision (d), father characterizes A.S. as "a willing participant" in their sexual relationship, who "perhaps, even encouraged" it. Father points to the age difference between 14-year-old A.S. and minor, who was not yet two years old when dependency jurisdiction was exercised, as well as the fact that A.S. was his cousin rather than his child and the lack of evidence that he sexually abused any other child residing in the family home. None of these factors, if true, would preclude the juvenile court from exercising jurisdiction. (See, e.g., *Los Angeles County*, *supra*, 215 Cal.App.4th at p. 970 [rejecting "distinction between a stepdaughter and a biological daughter" for purpose of assessing whether sexual abuse of stepdaughter placed biological daughter at risk of sexual abuse]; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1407 [affirming exercise of dependency jurisdiction over

two-year-old boy based on his father's sexual abuse of the boy's 12- and 14-year-old half-sisters].) We therefore view defendant's various arguments as invitations to reweigh the evidence, which we may not accept under our standard of review. (See *In re R.V.*, *supra*, 208 Cal.App.4th at p. 843.)

Father attempts to analogize the instant case to *In re B.T.* (2011) 193 Cal.App.4th 685, abrogated on other grounds by *In re R.T.* (2017) 3 Cal.5th 622, but his reliance is misplaced. In *In re B.T.*, the juvenile court exercised jurisdiction, pursuant to section 300, subdivisions (b) and (d), over an infant girl whose mother had, while in her late 30's, engaged in an unlawful sexual relationship with the infant's father when he was 14 or 15 years old. (*In re B.T.*, *supra*, 193 Cal.App.4th at pp. 687–692.) The Court of Appeal reversed the jurisdictional findings, concluding, as relevant here, that it was "a complete non sequitur" to assume that "an adult woman who has had a consensual sexual relationship with an unrelated 15-year-old boy will probably sexually abuse her infant daughter." (*Id.* at p. 694.) Here, in contrast, father abused a child who was a biological relative, was the same gender as minor, and resided in the same home as minor. We find that the circumstances of *In re B.T.* are readily distinguishable and that, here, it is not a non sequitur to conclude that father's sexual abuse of A.S. created a substantial risk to minor of sexual abuse.

Based on our conclusion that substantial evidence supported the juvenile court's exercise of jurisdiction under section 300, subdivision (d), we need not and do not consider whether jurisdiction was also proper under section 300, subdivision (b)(1). (See *In re I.J.*, *supra*, 56 Cal.4th at p. 773; *In re Ashley B.* (2011) 202 Cal.App.4th 968, 979 ["As long as there is

one unassailable jurisdictional finding, it is immaterial that another might be inappropriate"].)

III. Substantial Evidence Supported the Order Removing Minor from Father's Custody.

Father also challenges the evidentiary basis for the dispositional order removing minor from his custody.

A. Relevant law

Before removing a minor from a parent's custody, the juvenile court is required to "make one of five specified findings by clear and convincing evidence. (§ 361, subd. (c).) One ground for removal is that there is a substantial risk of injury to the child's physical health, safety, protection or emotional well-being if he or she were returned home, and there are no reasonable means to protect the child. (§ 361, subd. (c)(1).) '"Clear and convincing" evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]' [Citation.] Actual harm to a child is not necessary before a child can be removed. 'Reasonable apprehension stands as an accepted basis for the exercise of state power.'" (*In re V.L.*, *supra*, 54 Cal.App.5th at p. 154.)

B. Standard of review

We review a dispositional order removing a minor from parental custody for substantial evidence. (*In re V.L.*, *supra*, 54 Cal.App.5th at p. 154.) Because the juvenile court must make its finding that a ground for removal exists under the clear and convincing evidence standard of proof (§ 361, subd. (c)), "the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact

finder could have found it highly probable that the fact was true." (*O.B.*, *supra*, 9 Cal.5th at p. 1011.)

C. Analysis

The same evidence that supported the court's exercise of dependency jurisdiction under section 300, subdivision (d), also constituted substantial evidence from which the juvenile court could find it highly probable that minor would be at risk of substantial danger—either physically or emotionally—if she remained in father's custody, and that no reasonable means existed to protect her short of removal.[5] (§ 361, subd. (c)(1).)

Father's arguments to the contrary are unpersuasive. His assertions that he had no history of actually abusing or neglecting minor, that he had no prior criminal history, that he had no history of mental health or substance abuse problems, that none of the other minors in the home expressed fear of him, and that "[h]is relationship with A.S. was unique to A.S." merely go to the interpretation and weight of the evidence, which we may not reevaluate. (See *O.B.*, *supra*, 9 Cal.5th at pp. 1008–1009.) Nor may we "substitute our deductions for those of the trier of fact." (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) Having identified substantial evidence supporting the

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[5] Quoting *In re R.V.*, *supra*, 208 Cal.App.4th at p. 849, DCFS asserts that jurisdictional findings constitute prima facie evidence that a minor cannot remain safely in the home. This presumption only applies, however, when a minor has been adjudicated a dependent of the court pursuant to section 300, subdivision (e) (severe physical abuse to a child under five). (§ 361, subd. (c)(1); *In re E.E.* (2020) 49 Cal.App.5th 195, 217–219; *In re K.S.* (2016) 244 Cal.App.4th 327, 342.) Accordingly, it is inapplicable here.

order, "it is of no consequence that the [lower] court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.)

Regarding whether reasonable means existed to protect minor short of removal, father contends that, because he was in custody at the time of the dispositional order, minor was protected and removal was unnecessary. But father had not been convicted or sentenced. The reasonable inference follows that he could be released from custody at any time and, without the juvenile court's intervention, return to the family home, placing minor at substantial risk. (See *In re Carlos T.* (2009) 174 Cal.App.4th 795, 806 [the incarceration of a father, who had been convicted but not yet sentenced and still had the right to appeal his convictions, did not eliminate the substantial risk that his children would be abused]. Father also suggests that the court could have entered an order prohibiting father from residing with minor in the same home as A.S., authorizing unannounced visits, or referring father "to services to assist with his judgment in sexual matters." The court could reasonably conclude that none of these measures would sufficiently abate the risk to minor.

DISPOSITION

The findings and order are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT